IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1496 of 1981

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KACHARA JETHABHAI

Versus

DANABHAI SHANABHAI

Appearance:

1. First Appeal No. 1496 of 1981

MR AJ PATEL for Petitioner No. 1

MR GR SHAIKH for Respondents No. 1-6

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 08/11/2001

ORAL JUDGEMENT

1. The present appellant - original defendant has filed this appeal against the judgement and decree passed by the learned Civil Judge (S.D.), Ahmedabad (Rural) at Narol in Special Civil Suit No.16 of 1975.

2. Case of the respondents - original plaintiffs may in brief as under :-

The suit field and house as described in para 1 of the plaint of the suit, are situated in Dhamatvan and belongs to the original plaintiffs. The suit property solely belonged to one Mania Jalla and that his widow bai Hiri inherited Sama on his death and that bai Hiri has died on 27/2/1964 and on her death the plaintiffs have become owners thereof by virtue of inheritance. That bai Hiri had three daughters namely [1] Dhuliben [2] Ashiben and [3] Baniben. That Dhuliben and Ashiben have died leaving behind the plaintiffs. The defendant has no right or interest in the suit property. That the defendant has unauthorisedly usurped possession of the suit property by putting forward his claim on the strength of alleged will made in their favour by bai Hiri. That it is a get up and fabricated will. That bai Hiri has not made any so-called will. That she had no reason to divest the plaintiffs of their inherent right to inherit the property. That the defendant is trespasser on the suit property. Hence the suit for declaration that the defendant is in unauthorized possession of the property as trespasser and to recover possession of the suit property from him and for mesne profit for three years prior to suit and from the date of the suit till they recover possession of the suit field from the defendant as prayed in para 9 of the plaint.

2. The defendant appeared in the aforesaid suit and filed written statement contending that the plaintiffs have filed a false suit, which is barred by the Revenue Jurisdiction Act. It is denied that the plaintiffs are owners of the suit property. It was contended that he was cultivating her property as tenant, and was giving share in the agricultural produce cultivated in the field and that she has executed a will in his favour and thereby he has become the owner. It was further contended that the suit is time barred. It is denied that he is in unauthorized possession of the suit property as trespasser. Contending accordingly, the defendant prayed for dismissal of the suit with costs.

3. Thereafter, the trial court on the basis of pleadings framed issued and answered accordingly.

4. After hearing the learned advocates for the respective parties and considering the oral as well as documentary evidence on record, decreed the suit in favour of the plaintiffs, against which the present appeal is preferred by the defendant.

5. I have heard learned counsel Ms. Usha Patel for learned counsel Mr.AJ Patel for the appellant and learned

counsel Mr.GR Shaikh for the respondents.

6. I have gone through the reasoned judgement and decree of the trial court as well as oral and documentary evidence on record which has been shown to me by the learned counsel for the respective parties.

7. The learned counsel for the appellant has mainly contended that the property in question is an ancestral property which has been inherited by Jethabhai and Manabhai and the present appellant namely Kacharabhai is son of Jethabhai whereas Manabhai died intestate and, therefore, his widow bai Hiri became owner of the 1/2 share of the inherited property and entries to that effects were mutated in the revenue record in the year 1933. She has further argued that bai Hiri has made a Will on 19/2/1963 and the present appellant has became owner and occupier of the property in question by way of the said Will made by Hiri. She has further argued that the appellant is cultivating the agricultural land in question from the date of demise of Manabhai and he was giving 1/4th share of the crop to Bai Hiri, and thereby he is also tenant of the agricultural land. She has further argued that in view of the above facts and circumstances, the present appellant is not trespassers but he is owner of the property in question by Will. She has also drawn my attention towards issue No.7 framed by the trial court and argued that the same has been dealt with by the trial court without giving any cogent reasons.

8. On the other hand , Mr.Shaikh, learned counsel for the respondents has mainly argued that the so-called Will in question upon which the appellant relies, is not produced by the appellant on the record of the case and the same not proved and therefore, the question for giving any reason to that effect does not arise. He has further argued that there is no question to bequeath the property in question to the appellant by the so-called Will as the bai Hiri has three daughters. He has further argued that in fact there is no such will and the whole story of the so-called Will is got-up and concocted one and that is why, the appellant has not produced any so-called will on record before the trial court.

9. Having heard the learned counsel for the respective parties, the following facts emerge as undisputed facts :-

That the property in question is an ancestral property and it has inherited by the father of the

appellant i.e. Jethabhai and Manabhai i.e. husband of deceased Hiri and entries to that effect are also mutated in the revenue record vide Entry No.1673 in 1933.

10. The arguments of the learned counsel for the appellant is in two folds namely [1] that the appellant is owner of the land in question by way of will and [2] the appellant has became deemed purchaser of the land in question by way of tenancy. The trial court has framed issues to that effect at Ex.3/A and 7 respectively, which are as under :-

Issue No.3/A.
Whether the defendant proves that he was tenant and has became deemed purchaser of the suit land ?

Issue No.7.
Whether the defendant proves that the will is in his favour and in respect of suit property as alleged ?

11. As the aforesaid issues were framed, reference under Sec.85(A) of the Bombay Tenancy and Agricultural Lands Act, 1948 was required to be made and the same has been made and pursuant to that, proceedings were stayed and the appellant - original defendant appeared before the concerned revenue authority and made a statement that he is owner of the land in question and there is no question of his being tenant and hence the reference was sent back to the court by the Tenancy Mamlatdar by order dtd.1/5/1980. The trial court has rightly answered the issue NO.3/A in negative, as the reference is withdrawn by the defendant, and thus no error has been committed by the trial court while answering the issue No.3/A.

For second contention regarding Will, the trial court has framed issue at Issue No.7 and answered the same in negative. The trial court has held that the defendant has failed to produce and prove so-called Will, and therefore, the question for giving any reason for the so-called Will does not arise. Further, When there is a specific issue has been framed regarding Will, it was the duty of the defendant to prove his contention to that effect, but the defendant failed to produce and prove the will. Over and above, in absence of so-called will, it cannot be said that the so-called will has been executed by Hiri in favour of the appellant original defendant. The fact which has been established from the record is that the false entries mutated in the revenue record at the request of the appellant, has been cancelled by the revenue authority for which the trial court has made

detailed discussion on page 4 on para 9 in his judgement. There is no substance in the argument of the learned counsel for the appellant that the trial court has not given any cogent and convincing reason regarding issue No.7. The trial court has rightly answered the issue No.7 and no error has been committed while doing so. In the above established facts and circumstances, when there is no will on record and when the appellant is not claiming any right by way of tenancy, Hiriben is the owner and possessor of the property in question and therefore, the trial court has rightly held that the appellant original defendant is the trespasser and rightly decreed the suit in favour of the respondents - original plaintiffs and against the appellant original defendant.

12. In view of the above facts and circumstances, I see no merits in the appeal. The same is required to be dismissed and is accordingly dismissed with no order as to costs

13. The learned counsel for the respondents does not press the Cross-objections and hence the same is accordingly disposed of.

14. The appellant - original defendant is hereby directed to hand-over the vacant and peaceful possession of the land in question to the respondents - original plaintiffs within a period of four months from today, along with mesne profit, failing which the respondents original plaintiffs are at liberty to take appropriate proceedings against the appellant - original defendants.

(R.P. DHOLAKIA, J.)